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Decision No. S9223 AUG 8 1978

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

PACIFIC SOUTHWEST AIRLINES,)
 a corporation,)
)
 Complainant,)
)
 vs.)
)
 AIR CALIFORNIA,)
 a corporation,)
)
 Defendant.)

Case No. 10641
(Filed August 2, 1978)

Brownell Merrell, Jr., Attorney at Law, for complainant.
Graham & James, by Boris H. Lakusta and David Marchant,
 and Robert Barnett, Attorneys at Law, for defendant.

O P I N I O N

Complainant alleges that defendant is violating Section 2752 of the Public Utilities Code by engaging in the operation of transporting passengers between Oakland International Airport (OAK) and San Diego International Airport (SAN) via San Jose Municipal Airport (SJC) without a certificate of public convenience and necessity authorizing such operation. Public hearing was held August 7, 1978 before Administrative Law Judge J. E. Thompson at San Francisco and the matter was submitted.

Findings

1. Defendant is a passenger air carrier with authority to transport passengers between points over numerous routes within California. Those pertinent to the inquiry here are:

Route 3. Nonstop service between SAN and SJC.

Route 4. Between SAN, on the one hand, and SJC and OAK, on the other hand, via the intermediate point of Orange County Airport or Ontario International Airport, with SJC and OAK being either a terminal or intermediate point for this route; and provided that the number of flights via Ontario International Airport in each direction shall not exceed two in any one day.

2. By Decision No. 83476 dated September 17, 1974 in Application No. 54511, defendant was awarded a certificate of public convenience and necessity authorizing it to operate as a passenger air carrier between OAK and SJC on its certificated routes listed below:

Route 1. Santa Ana/SJC/OAK/San Francisco.

Route 2. Santa Ana/Ontario/SJC/OAK.

Route 4. SAN/Santa Ana/SJC/OAK.

Route 5. Palm Springs/SJC/OAK/San Francisco.

That certificate is subject to the express condition that any combining of the authority therein granted with any other certificate or operating authority issued to or possessed by defendant for the purpose of establishing through routes, rates, charges, and classifications as provided for in Section 2762 of the Public Utilities Code is prohibited.

3. Defendant has been and is engaged in the operation of transporting passengers between SAN and OAK via the intermediate point of SJC since November 1, 1970.

Discussion

Complainant contends that defendant lacks certificated authority to conduct the operations between SAN and OAK via SJC without also stopping at Orange County Airport or Ontario International Airport. Defendant claims that the Route 4 authority does not require the additional stop. The description of the authority in Route 4 clearly requires operation via Orange County Airport or Ontario International Airport.

The authority for Route 4 has been modified and restated a number of times. We look to the certificates which have been awarded for operations over that route and the decisions awarding those certificates to determine whether there are any conclusions in those decisions which would support an interpretation of the certificates awarded for authority to operate over the route SAN-SJC-OAK.

Defendant was first granted authority to provide service at SAN by Decision No. 76110 dated September 3, 1969. That decision granted a certificate for two separate routes: Route 3 - nonstop service between SAN and SJC; and Route 4 - nonstop service between SAN and OAK. That certificate was subject to the restriction that no passengers shall be accepted for transportation solely between: (i) SAN and other airports already served by defendant except as authorized by Routes 3 and 4. (Air California et al. (1969) 70 CPUC 122, 136, 137.)

In Application No. 52165 filed August 27, 1970, defendant sought modification of its nonstop authorities so that it could operate from SAN via Orange County Airport to SJC and OAK. By ex parte order in Decision No. 77768, as amended by Decision No. 77777, the Commission found it reasonable to modify, until March 1, 1971, the nonstop authority and did so in the following form of order,

- "1. Restriction 'i' set forth in Appendix B, Original Page 2, of Decision No. 76110 in Application No. 50381 is temporarily modified to provide that Air California may commence service on or before November 16, 1970, and through February 28, 1971, operate its service between SAN and SJC and OAK via Orange County Airport; and that Air California may designate SJC and OAK as either intermediate or separate terminals, provided, however, that no passengers may be transported solely between SAN and Orange County Airport, or between SJC and OAK, in either direction.
- "2. The modification authority granted in paragraph 1 of this order will expire effective March 1, 1971 at which time restriction 'i' set forth in Appendix B, Original Page 2, of Decision No. 76110 will immediately again become effective and will remain in full force and effect.
- "3. In all other respects Decision No. 76110 remains in full force and effect."

On January 13, 1971 defendant filed a petition to further modify its request in Application No. 52165 for authority to carry local passengers between SAN and Orange County Airport and between SJC and OAK. It requested that this modification be granted ex parte before hearing then scheduled in February, and that the matter be included in that hearing for final determination. In a procedural order in Decision No. 78276 the Commission in effect denied that request. After petition for rehearing of that decision by defendant, the Commission on February 9, 1971 issued Decision No. 78299 with an "Order Granting Modification of Decision No. 78276" which provided:

- "1. Decision No. 78276, dated February 2, 1971, is temporarily modified to provide that paragraph 1 of the Commission's order in Decision No. 77768, dated September 22, 1970, in Application No. 52165, is temporarily modified to provide that Air California may, for the period from the effective date of the order herein until August 31, 1971, transport passengers solely between SAN and Orange County Airport as part of its temporary through service between SAN and SJC and OAK via Orange County Airport."

The status of Routes 3 and 4 with the temporary modifications was finally resolved in Decision No. 80318 (Air California, et al. (1972) 73 CPUC 671). The conclusions of the Commission are set forth at page 692.

"Air Cal's Route 3, SAN-SJC nonstop service, will be modified to require only one daily nonstop round-trip flight; and Route 4, SAN-OAK, will be restated to provide for one-stop service to SJC and OAK, with either point as a terminal or intermediate point, via Santa Ana. We will prohibit nonstop SAN-OAK service on this route because Air Cal has never commenced this service, and it does not intend to do so in the foreseeable future. Moreover, if it did, it would undoubtedly have to engage in wing-tip to wing-tip competition with PSA. Since Air Cal has not utilized this authority, we will delete it. We will also grant Air Cal authority to operate between SAN and Santa Ana as a separate route so that it may operate turnaround service in this market if necessary or convenient. A restriction proposed by the staff to prohibit SAN-San Francisco operations will be added to each route."

With respect to the authority to carry O&D SJC-OAK passengers on defendant's flights, the Commission concluded that such authority should be denied (p. 692). The authorities granted in that decision together with other certificates held by defendant at the time were set forth in a new certificate of public convenience and necessity. The routes were described in Appendix A to that decision. Route 4 was described as follows:

Route 4. Between SAN, on the one hand, and SJC and OAK, on the other hand, via the intermediate point of Orange County Airport, with SJC and OAK being either a terminal or intermediate point for this route.

Since that restatement of defendant's operating authority there have been only two modifications of Route 4. The first was in Decision No. 83476 referred to in Finding 2 when defendant was granted authority to ticket passengers between SJC and OAK on flights operated on Route 4. The other modification was made in Decision No. 85594 in Application No. 55011 when defendant was authorized to operate Route 4 via Ontario as an alternative to operations via Orange County.

Review of those proceedings discloses that at no time was defendant awarded a certificate to operate between SAN and OAK via SJC without an intermediate stop at Orange County or Ontario; at no time has the Commission found that public convenience and necessity require the operation of defendant between SAN and OAK via SJC; and at no time has defendant applied for authority to operate between SAN and OAK via SJC.

Defendant claims that Section 2762 of the Public Utilities Code is sufficient authorization for its operation.^{1/} It contends

1/ Section 2762:

"Unless prohibited by the terms and conditions of any certificate that may be involved, any one passenger air carrier may establish through routes and rates, charges, and classifications between any and all points served by it under any and all certificates or operative rights issued to or possessed by it."

that the phrase "via the intermediate point of Orange County Airport or Ontario International Airport" is a term and condition of Route 4 but is not a prohibition contemplated by Section 2762. In simple language what it is saying is that although the route description says there shall be a stop at the intermediate point of Orange County or Ontario, because defendant may, under that certificate, serve SAN, SJC, and OAK, it may operate between those points in any manner it wishes under Section 2762 because the Commission has not expressly prohibited it. That contention has no merit. The phrase states that the operation is to be "via Orange County Airport or Ontario International Airport".

~~That~~ That is a term or condition prohibiting defendant from operating that route except via either of those points. It would have been ~~an~~ an act of redundancy to have imposed a further prohibition to the effect that defendant shall not overfly Orange County or Ontario on this route.

Defendant contends that its interpretation should prevail for two reasons: That it has been operating this route without secrecy and to the apparent knowledge of the Commission and its staff for seven years and nine months, and that Section 2762 would have no meaning or application except to a circumstance as presented here. With respect to its first contention we point out that certificated authority may not be conferred or implied from any inaction by the Commission. The statute provides that no passenger air carrier operation is to be conducted without a certificate, it provides that a certificate may issue only after a finding by the Commission of public convenience and necessity, and it specifically requires the Commission to consider a number of factors in making its determination of public convenience and necessity. With respect to its second contention, we point out that Section 2762 is the provision of the statute which permits

"tacking", which is nothing more than establishing through routes. It is the statutory authority which permits defendant to provide a through service between SAN and Sacramento via SJC by combining its Route 3 (SAN-SJC) with its Route 7 (SJC-SMF).

Defendant has been operating a passenger air carrier service between SAN and OAK via SJC without a certificate or certificates of public convenience and necessity authorizing such operation.

If this scenario appears to be familiar, it is. Only two weeks ago we were confronted with a complaint by defendant against complainant for the identical operation involved here, an operation between SAN and OAK via SJC (Case No. 10626). This episode in the saga of proceedings brought by complainant and defendant might appropriately be entitled, "Hoist On Its Own Petard". It might be amusing were it not that the public has a stake in what might appear to be petty bickering between the two largest California intrastate airlines. In our discussion regarding Case No. 10626 at our regular session only two weeks ago, several of the Commissioners announced or indicated their concern that the law required them to cause PSA to cease and desist an operation which is efficient and economical, particularly in light of the facts that PSA holds authority to transport passengers nonstop and one-stop between SAN and OAK and between SAN and SJC. It may also ticket passengers between SJC and OAK on some of its routes. The fact remained, however, that PSA had no certificate authorizing it to transport passengers between SAN and OAK via SJC.

We have the same situation here regarding defendant. Its operation is an efficient and economical one for transporting passengers between SAN and SJC and between SAN and OAK. It holds authority to transport passengers both nonstop and one-stop between SAN and SJC and one-stop between SAN and OAK. It may also ticket passengers between SJC and OAK on some of its routes, including Route 4. The

fact remains, however, that Air California has no certificate authorizing it to operate between SAN and OAK via SJC without an intermediate stop at Orange County or Ontario.

If it were in our power to do so, we would today grant a certificate to both of these carriers to authorize operations between SAN and OAK via SJC. We are prevented from so doing by the provisions of the Public Utilities Code, more particularly Sections 2753 and 2754.^{2/} Although once again we are reluctant to do so, we must reiterate to our holding in Decision No. 89168.

The law is plain. Section 2752 provides that no passenger air carrier shall engage in any operation in this State without first having obtained from the Commission a certificate of public convenience and necessity authorizing such operation. There is no equivocation nor does the statute provide for any extenuating circumstances. Section 2763 provides for the Commission to make its order requiring defendant to cease and desist from operations without a certificate and requires the Commission to enforce such order. While surrounding circumstances do not permit discretion as to whether a cease and desist order should be entered, they may be considered, with respect to the time, when the activity should be ceased. Because of the same circumstances referred to in

2/ At the hearing the ALJ informed the parties that inasmuch as there does not appear to be any passenger air carriers other than complainant and defendant withstanding to protest an application by either or both carriers for authority to operate over the SAN-SJC-OAK route, he would grant the carriers leave to make application on the record in this proceeding and docket the transcript as their respective written applications on the assurance that the application fee required by Section 2754 would be paid, waive the Commission's procedural rules with respect to such filings, and on the stipulation by both parties that they do not protest the application of the other, would prepare a form of order for the Commission's consideration which would grant both carriers a certificate. PSA was receptive to the offer. Air California would not enter into such a stipulation.

Decision No. 89168 there can be no different result. Accordingly, in order to avoid inconvenience to the public, we will consider this matter today as an unforeseen emergency situation under Section 306(b) of the Public Utilities Code and shall require defendant to cease and desist on or before August 22, 1978, which is the date of the next regular session of the Commission.

Conclusions

1. Defendant has been and is violating Section 2752 of the Public Utilities Code.
2. Defendant should be ordered to cease and desist from conducting passenger air carrier operations between OAK and SAN via SJC without stopping at the intermediate point of Orange County Airport or Ontario International Airport.
3. This matter came to the attention of the Commission on August 2, 1978 and is an unforeseen emergency situation as described in Section 306(b) of the Public Utilities Code necessitating prompt action by the Commission.
4. To permit defendant reasonable opportunity to comply with the cease and desist order herein, and to avoid the inconvenience to the public who presently have future reservations on the flights herein involved, defendant should be ordered to cease and desist the unlawful operations on or before August 22, 1978.

O R D E R

IT IS ORDERED that Air California, a corporation, shall, on or before August 22, 1978, cease and desist from carrying passengers by air on a through route between San Diego International Airport and Oakland International Airport via San Jose Municipal Airport without stopping at the intermediate point of Orange County Airport or Ontario International Airport.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 8th day of AUGUST, 1978.

Robert B. Berman
President

Virginia L. Sturgeon
Richard D. Hovde

Commissioners

Commissioner William Symons, Jr., being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.